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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.04.2007

Coram :

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN
AND
THE HONOURABLE MR.JUSTICE P.P.S.JANARTHANA RAJA

Tax Case (Appeal) No.88 of 2004

M/s.Beardsell Ltd.,
No.47, Greams Road,
Chennai-600 006. ..Appellant

Vs

The Joint Commissioner of Income-tax,
Special Range-I,
121, Nungambakkam High Road,
Chennai-600 034. ..Respondent

Appeal under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras Bench 'C', Chennai in I.T.A. No.433(Mds)/99 dated 26.06.2001 for the assessment year 1994-95 against the order of Commissioner of Income Tax Chennai in CS.218-i (2) 97-98 dated 12.2.99 against order in GI.No. PA 8-B/47-004-C8-7161, dated 30.8.2006 on the file of the Deputy Commissioner of Income Tax, Special Range-I Madras.

For Appellant : Mr.T.R.Senthil Kumar

For Respondent : Mrs.Pushya Sitaraman,
Sr. Standing Counsel for
Income-tax Department

JUDGMENT

(Judgment of the Court was delivered by
P.P.S.Janarthana Raja, J.)

This appeal is filed under Section 260A of the Income Tax Act, 1961 by the assessee, against the order of the Income Tax Appellate Tribunal, Madras Bench 'C' in I.T.A. No.433(Mds)/99 dated 26.06.2001. On 23.02.2004, this Court admitted the appeal and formulated the following substantial question of law.

> "Whether on the facts and in the circumstances of the case the Appellate Tribunal is right in law in holding that the sum agreed to be paid to the appellant as sub-lessee by the lessee of the premises for the failure to

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provide alternate accommodation is taxable under the head Capital Gains, which is prior to the amendment by the Finance Act, 1995?"

2. The facts leading to the above substantial question of law are as under:

The assessee is engaged in the manufacture of expanded polythene insulation material, marketing of chemicals, motors, engineering products and also in export business. The relevant assessment year is 1994-95 and the corresponding accounting year ended on 31.03.1994. The assessee is a company incorporated under the Companies Act. The assessee filed Return of income for the assessment year showing total loss at Rs.11,23,596/-. The case was processed under Section 143(1) of the Income-tax Act ("Act" in short) on 12.01.1995 accepting the returned loss. Later, notice under Section 143(2) of the Act was served and the assessment was completed on 30.08.1996 under Section 143(3) of the Act, determining the net loss at Rs.7,61,580/-. During the course of assessment proceedings, it was noticed that an amount of Rs.99,00,000/- was credited in the Profit and Loss Account, under the head "Commission, Fees and Miscellaneous". It was explained by the assessee that the said amount had been received by way of surrender of tenancy rights and also claimed that this receipt was not taxable being in the nature of a capital receipt. The contention of the assessee was accepted by the Assessing Officer and hence the said amount of Rs.99,00,000/- was not included in the computation of income. The Commissioner of Income-tax was of the view that the said assessment order passed by the Assessing Officer was erroneous and prejudicial to the interest of the Revenue and hence proceedings were initiated under Section 263 of the Act. Show Cause Notice was also issued on 12.08.1998 calling for the assessee's objections if any, to the proposed revision under Section 263 of the Act. The Commissioner of Income-tax was of the view that the order is wrong in view of the decision of the ITAT, Spl. Bench, Mumbai in the case of Cadell Weaving Mill Co. P. Ltd. (217 ITA (AT) 51). In that decision, it was held that the amount received by the assessee on surrender of tenancy right, should be considered as casual income and therefore the same is taxable under Section 10(3) of the Act. In view of the same, the Commissioner of Income-tax held as follows:-

> "10. On the other hand, the receipt in question is to be considered as income as the said receipt arose out of an agreement which was arrived at between the assessee, Beardsell Ltd. and the lessee, M/s.Francis Theodore D'Souza and Mahadeo Soma Tamboskar. The Spl. Bench, Mumbai in the decision cited in 217 ITR ITAT Reports P.51, had held that the assessee i.e., Cadell Weaving Mill Pvt. Ltd. was only a statutory tenant who did not have any right to further transfer its tenancy right under the terms of the original tenancy agreement and therefore had no transferable right nor any asset which it can transfer. It had only a mere personal right which cannot be transferred to another person. Thus the receipt obtained by the assessee towards

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surrender of his tenancy rights cannot be considered as a capital receipt or capital gain, but can be considered merely as receipts which are synonymous with income. While arriving at this conclusion, the Spl. Bench, ITAT relied on the cases reported in CIT v. Gulab Chand (192 ITR 495 - A11) and the decision of the Supreme Court in A.Gasper vs. CIT (192 ITR 382). After considering the facts and circumstances of the case, the ITAT, Spl. Bench concluded that sec. 10(3) of the I.T. Act squarely applies to the receipt and the amount of Rs.1.40 crores received by Cadell Weaving Mill Pvt. Ltd. for surrendering its tenanted premises was held as its casual and non-recurring income for the assessment year 1990-91.

11. The facts being identical in the assessee's case, the decision of the Spl. Bench Mumbai reported in 217 ITR ITAT Report P.51 is followed and the amount of Rs.99 lacs received by the assessee on the surrender of tenancy rights is held to be in the nature of casual income chargeable u/s. 10(3) of the Income-tax Act.

12. The assessment for 1994-95 is, therefore, being erroneous and prejudicial to revenue, revised u/s.263 with a direction to the assessing Officer to assess the amount of Rs.99 lacs received by the assessee on the surrender of tenancy rights."

Aggrieved by the order, the assessee filed an appeal to the Income-tax Appellate Tribunal ("Tribunal" in short). The Tribunal dismissed the appeal and held that the amount is taxable on the basis that it results in transfer of capital asset and held as follows:-

"9. As observed earlier, notwithstanding the observation of the Commissioner to the decision of the Special Bench, the fact remains that the issue in the instant case is one of assignment of interest of tenancy etc. in favour of another tenant who perfected his title to the tenancy. The Tribunal under sec. 254 (1) of the Act is required to pass such orders as it think fit, meaning thereby if an item of receipt is taxable as income and the authorities have held it as taxable under a particular section, the Tribunal when finding that the receipt is taxable, it could hold so though the section that was referred to by the authorities may not be applicable. In the instant case it is not a case of surrender of tenancy right is our finding. The finding is that it is a case of assignment of rights in tenancy in favour of the third tenant for which the assessee was compensated. Therefore, the amounts are taxable on the basis that it results in transfer of capital asset. The order of the Assessing Officer, which did not bring to tax this amount, is clearly erroneous and prejudicial to the interests of revenue. We accordingly modify the order

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of the C.I.T. to the extent observed above and that the amount so received would be brought to tax as long term capital gains and the provisions concerning sections 45 to 55 would apply to the facts of the case."

3. Learned counsel appearing for the assessee submitted that the capital gain is not attracted in the assessee's case as the cost of acquisition of the capital asset is nil and relied on the judgment of the Supreme Court in the case of Commissioner of Income-tax, Bangalore Vs. B.C.Srinivasa Setty reported in 128 ITR 294 to support his contention. Further it is contended that the assessment year involved in the present case is 1994-95 which is prior to the amendment of Section 55(2) of the Act and hence no capital gain is attracted.

4. Learned Senior Standing Counsel appearing for the Revenue submitted that the Tribunal is right in its finding that it is a case of assignment of rights in tenancy in favour of the third party for which the assessee was compensated and therefore the amount is taxable on the basis that it resulted in transfer of capital assets. Hence the order passed by the Tribunal is in accordance with law.

5. Heard the counsel. M/s.New Sun Mills Co. Pvt. Ltd. owned a piece and parcel of land admeasuring 3609.50 sq. Yards (32485 sq.ft.) at Sun Mill Road, Lower Parel, Bombay. By Lease Deed dated 20.06.1961, the said land was given on lease for 25 years to the partners of Crema Industries, namely, Mr.Francis Theodore D'Souza and Mr.Mahadeo Soma Tamboskar. The said lease was renewed for a further period of 99 years by a Lease Deed dated 27.01.1988. On 24.09.1971, the assessee entered into a lease arrangement with Crema Industries to occupy and use an area measuring 4945 sq.ft. in Block A of the Sun Mill Compound, Lower Parale, Bombay. The rent payable by the assessee was Rs.1 per sq.ft. per month. The said Lease Agreement was to come into effect on 11.10.1971 and remain in force for a period of 36 months with a option to renew it for a further period of 36 months on the same terms. The assessee remained in possession even after the expiry of 72 months from 11.10.1971. On 22.01.1993, sub-lessee, the assessee requested the lessee, Mr.Francis Theodore D'Souza for permission to sub-let a portion of the above premises. Permission was given on 29.01.1993 to the assessee to sub-let the premises. On 10.06.1993, the assessee sub-let 3000 sq.ft. of the premises to Turel Sales Corporation at a minimum charge of Rs.25,000/- per month payable quarterly. On 01.12.1993, Mr.Francis Theodore D'Souza requested the assessee that he need the premises for his own purposes and further, he agreed to get an alternate accommodation of equal area in near about locality within a reasonable time, failing which he agreed to pay adequate compensation. Later a memorandum was entered on 04.01.1994 between Mr.Francis Theodore D'Souza (lessee) and the assessee. Clause 2 of the memorandum states that the lessee will give alternative accommodation within a period of six weeks from that day to the sub-lessee, failing which he will be liable to pay Rs.99,00,000/- to the sub-lessee in lieu of providing alternative accommodation. On 07.03.1994,

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Mr.Francis Theodore D'Souza informed the assessee that he was not able to provide the alternative accommodation and hence he will arrange to pay the compensation of Rs.99,00,000/- as agreed in the agreement. Further, he instructed Mr.A.E.Turel of M/s.Turel Sales Corporation to pay to the assessee on his behalf, Rs.90,00,000/- immediately and the balance of Rs.9,00,000/- after the surrender of the premises. The assessee received compensation and on 31.03.1994, surrendered the premises to Mr.Francis Theodore D'Souza. The assessee is compensated for surrendering the tenancy right. The finding given by the Tribunal is that it is a case of assignment of right in the tenancy in favour of the third party in which the assessee was compensated and therefore the amount is taxable on the basis that it results in transfer of capital asset. It is not disputed that there is no cost for acquisition of the tenancy right. The assessment year involved in the present case is 1994-95 which is prior to the amendment to Section 55(2) of the Act. The amended section reads as follows:-

> "(2) For the purposes of sections 48 and 49, "cost of acquisition",-
>
> (a) in relation to a capital asset, being goodwill of a business, tenancy rights, stage carriage permits or loom hours,-
>
> i) in the case of acquisition of such asset by the assessee by purchase from a previous owner, means the amount of the purchase price; and
>
> ii) in any other case [not being a case falling under sub-clauses (i) to (iv) of sub-section (1) of section 49], shall be taken to be nil;"

The object of the new provision is to expand the scope of the existing provision so as to include goodwill, tenancy rights, stage carriage permits and loom hours. Their cost of acquisition should be taken to be the amount of purchase price if those assets are acquired by purchase and in other cases nil. The amended provision takes effect from 1st April 1995. Here we are concerned with the assessment year 1994-95. The Courts held that transfer of goodwill and tenancy right are not subject to income-tax as capital gain. In the case of Commissioner of Income-tax, Bangalore Vs. B.C.Srinivasa Setty (128 ITR 294) the Apex Court considered the scope of Section 45 and Section 48 of the Act and held as follows:-

> "Section 45 charges the profits or gains arising from the transfer of a capital asset to income-tax. The asset must be one which falls within the contemplation of the section. It must bear that quality which brings s.45 into play. To determine whether the goodwill of a new business is such an asset, it is permissible, as we shall presently show, to refer to certain other sections of the head "Capital gains". Section 45 is a charging section. For the purpose of imposing the charge, Parliament has enacted detailed provisions in order to compute the profits or gains under that head. No existing principle or provision at variance with them can be applied for determining the chargeable profits and gains. All

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transactions encompassed by s. 45 must fall under the governance of its computation provisions. A transaction to which those provisions cannot be applied must be regarded as never intended by s. 45 to be the subject of the charge. This inference flows from the general arrangement of the provisions in the I.T. Act, where under each head of income the charging provision is accompanied by a set of provisions for computing the income subject to that charge. The character of the computation provisions in each case bears a relationship to the nature of the charge. Thus, the charging section and the computation provisions together constitute an integrated code. When there is a case to which the computation provisions cannot apply at all, it is evident that such a case was not intended to fall within the charging section. Otherwise, one would be driven to conclude that while a certain income seems to fall within the charging section there is no scheme of computation for quantifying it. The legislative pattern discernible in the Act is against such a conclusion. It must be borne in mind that the legislative intent is presumed to run uniformly through the entire conspectus of provisions pertaining to each head of income. No doubt there is a qualitative difference between the charging provision and a computation provision. And ordinarily the operation of the charging provision cannot be affected by the construction of a particular computation provision. But the question here is whether it is possible to apply the computation provision at all if a certain interpretation is pressed on the charging provision. That pertains to the fundamental integrality of the statutory scheme provided for each head.

The point to consider then is whether if the expression "asset" in s. 45 is construed as including the goodwill of a new business, it is possible to apply the computation sections for quantifying the profits and gains on its transfer.

The mode of computation and deductions set forth in s. 48 provide the principal basis for quantifying the income chargeable under the head "Capital gains". The section provides that the income chargeable under that head shall be computed by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset:

"(ii) the cost of acquisition of the capital asset..."

What is contemplated is an asset in the acquisition of which it is possible to envisage a cost. The intent goes to the nature and character of the asset, that it is an asset which possesses the inherent

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> quality of being available on the expenditure of money to a person seeking to acquire it. It is immaterial that although the asset belongs to such a class, it may, on the facts of a certain case, be acquired without the payment of money. That kind of case is covered by s. 49 and its cost, for the purpose of s. 48, is determined in accordance with those provisions. There are other provisions which indicate that s. 48 is concerned with an asset capable of acquisition at a cost. Section 50 is one such provision. So also is sub-s. (2) of s. 55. None of the provisions pertaining to the head "Capital gains" suggests that they include an asset in the acquisition of which no cost at all can be conceived. Yet there are assets which are acquired by way of production in which no cost element can be identified or envisaged. From what has gone before, it is apparent that the goodwill generated in a new business has been so regarded. The elements which create it have already been detailed. In such a case, when the asset is sold and the consideration is brought to tax, what is charged is the capital value of the asset and not any profit or gain."

In view of the observation made by the Apex Court, the inevitable conclusion is that the amount received by the assessee not taxable under the capital gains.

6. The Commissioner of Income-tax has set aside the order of the assessment under Section 263 of the Act on teh ground that the order is erroneous and prejudicial to the interest of the Revenue in view of the decision of Special Bench, Mumbai in the case of Cadell Weaving Mill Co. P. Ltd. (217 ITA (AT) 51). The said Special Bench held that amount received on surrender of the tenancy right is assessable as casual income under Section 10(3) of the Act. Aggrieved by that order, the assessee in that case, filed an appeal to the Bombay High Court. The Bombay High Court considered the scope of Section 10(3) and also Section 45 of the Act and held that any amount received on transfer of a capital asset is liable to be taxed in accordance with the specific provisions of Section 45 to Section 55 of the Act and if any amount of capital gain is not taxable as capital gain for any reason, then, that amount cannot be treated as a casual and non-recurring receipt under Section 10(3) of the Act because Section 10(3) refers to types of income which do not form part of total income. Section 10(3) does not apply to capital receipts. The said Bombay High Court judgment is reported in 249 ITR 265. Aggrieved by the order of the Bombay High Court, the Revenue preferred an appeal to the Supreme Court. The said judgment is reported in 273 ITR 1, wherein it was held that the tenancy right is a capital asset and also the surrender of the tenancy right amounts to transfer and hence the consideration received is a capital receipt within the meaning of Section 45. Further it was also held that the amendment to Section 55(2) takes effect from 01.04.1995 and applies only in relation to the assessment year 1995-96 and subsequent

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assessment years. Further, the Supreme Court, by following its earlier decision in the case of Commissioner of Income-tax, Bangalore Vs. B.C.Srinivasa Setty cited supra, held that till the amendment in the year 1995, the law was that if the cost of acquisition of a capital asset could not in fact be determined, the transfer of such capital asset would not attract capital gains.

7. By following the Supreme Court judgments cited supra and also taking into consideration the amended provision of Section 55(2) of the Act, we are of the view that the Tribunal erred in holding that the compensated amount received by the assessee is subject to capital gains under the Income-tax Act.

8. In view of the foregoing reasons, we answer the question of law in favour of the assessee and against the Revenue. Accordingly, the tax case is allowed. No costs.

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Sd/
Asst. Registrar

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Sub Asst.Registrar

To

1.The Joint Commissioner of Income-tax,
Special Range-I,
121, Nungambakkam High Road,
Chennai-600 034.

2. The Assistant Registrar of Income Tax,
Rajaji Bhavan, Besant Nagar, Chennai.

3. The Commissioner of Income Tax,
No. 121, Mahatma Gandi Road, Chenai.

4. The Deputy Commissioner of income Tax,
Special RangeI Madras.
+ One cc to m/s Pusya Sitaraman, Advocate sR 24931
+ One cc to M/s M. Uttam Reddy, Advocate s?R 24670
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